IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-1688

LE ROY SYMM, *Appellant*,

v.

UNITED STATES OF AMERICA, et al., *Appellees*.

On Appeal From The United States District Court For The Southern District Of Texas

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BRIEF OPPOSING THE UNITED STATES' MOTION TO AFFIRM

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The unavoidable issue in this case is the meaning of residence for voting purposes. "Residence" was clearly construed in the published opinion of the district court. Words and phrases are defined by judicial construction. Thus, inescapably the definition of residence was affected by the decision of the lower court. That decision unequivocally says that students who are in Waller County only for the duration of their college education and have no intention of remaining in the county after its completion are voting residents. Historically, 96.37% of the

students at Prairie View A&M University fall into this category. Of 13,038 total alumni, only 473 have mailing addresses in Waller County. (Waller County Exhibit 9). William Dawn, a student deposed by the United States, would be considered a resident by the district court even though he testified "I am a resident of Dallas County." (Prairie View Student Depositions 79). So would Leon Kirk, another student-deponent, although he said his "address at home" was Fort Worth. (172).

The United States says that the question presented by this appeal is "whether the means used to determine the voting eligibility of students living on a college campus in Waller County, Texas, denied the students the right to vote on an equal basis with other citizens." This is a superficial issue in the case. But the deeper and much more significant question hidden in this language is whether these same students are residents. The "equal basis" established by the United States and the district court is in fact unequal in favor of nonresident students and denies equal protection to the legitimate and enduring interests of bona fide residents of the county. The Texas Election Code defines residence as "one's home and fixed place of habitation to which he intends to return after any temporary absence." Webster defines temporary as "lasting for a time only, impermanent, transitory". How can a student living in a dormitory with no intention of remaining in the county after graduation possibly be considered a resident within the foregoing statutory definition when his or her stay in the county will intentionally "last for a time only"—until completion of college? This Court, the Texas Supreme Court, and virtually every other court that has considered the question has held that duration is not by itself determinative of residence. Intention, volition and action are the elements to be considered and the vast majority of the Prairie View A&M students obviously have no intention of staying in Waller County after graduation. Their stay lasts for a time only. The injunction of the district court says that Mr. Symm must accept the meaningless statements of these individuals on residence. Just submit an application which says you are a resident and *ipso facto* you are a resident. The statements are meaningless because none of the applicants would know the statutory definition and elements of residence. All of the facts and circumstances should be considered, including the statements of the applicant. But even if Mr. Symm is relegated to the applicant's statements and nothing else, he should at least be able to ask the applicant whether he or she intends to remain in the county after graduation. Even this limited and clearly justified inquiry is precluded by the decision of the district court. And finally, Mr. Symm is forbidden to use the challenge procedures authorized by the Texas Election Code. Anyone who considers themself a resident of Waller County (whatever the term means to the individual) is a resident.

Mr. Symm is not implementing a permanent residence requirement or his own standards of residency as the United States erroneously claims. (Motion 2, 10). Neither is he "requiring students to show that they expect to reside in Waller County for a particular length of time . . ." (Motion 8, 9). He is applying the definition of residence contained in the Texas Election Code and only expects some indication that the stay in the county is not temporary, i.e., until the completion of college. Being a Waller County native, having parents or other family in the county, or living with one's spouse in the county are some of the previously accepted and entirely reasonable indicia of more than temporary residence.

The United States argues that the Court below did not require Mr. Symm "to give any special consideration to students at Prairie View A&M in the course of voter registration" (Motion 7) and that in the past, Mr. Symm "has singled out a particular group—students living on the campus of Prairie View A&M University—and has placed an extra burden on them that he does not impose on non-students—one that is placed on no other prospective voters in the state." (Motion 10). Quite to the contrary, it is not an extra burden to be a *bona fide* resident of the community, but students at Prairie View A&M no longer have to satisfy this legitimate prerequisite to voting and are therefore receiving special consideration.

The United States leaves the impression that for the first time on appeal Appellant abandoned an objection to the portion of the injunction barring him from applying a presumption against student nonresidency. This impression is erroneous. Mr. Symm has never objected to that portion of the injunction, and unless *Whatley v. Clark*, 482 F.2d 1230 (5th Cir. 1974), *cert. denied*, 415 U.S. 934, is rejected by this Court, he will not rely on such a presumption. But *Whatley* does not reverse the presumption or hold that students are automatically entitled to voter registration without satisfying residence requirements.

The District Court based its decision primarily on the Twenty-Sixth Amendment, and secondarily on Texas law. The lower court did not base its judgment on the Equal Protection Clause, notwithstanding the United States' current reliance on equal protection arguments to sustain the judgment. The Fifteenth Amendment was also ignored below.

The United States argues that "even if this Court were to determine that the district court misapplied federal statutory and constitutional principles applicable to voting rights, the judgment would still be supported by an adequate and independent state ground." (Motion 8). Cases are then cited apparently to support the proposition that this Court should not disturb the lower court's erroneous construction of state law. But *Herb v. Pitcairn*, 324 U.S. 117; *Minnesota v. National Tea Co.*, 309 U.S. 551, and *Jankovich v. Indiana Toll Road Commission*, 379 U.S. 487 hold that the Court will not review judgments of *state courts* that rest on adequate and independent state grounds. *Runyon v. McCrary*, 427 U.S. 160, 181-182; *Bishop v. Wood*, 426 U.S. 341, 346 and n. 10, and *Propper v. Clark*, 337 U.S. 472, 486-487, extend the rule to interpretations of state law in which a federal district court and court of appeals have concurred unless their conclusions are shown to be unreasonable. None of the cited cases extend the argument to the present situation in which no appellate court has reviewed the decision. It is also immaterial that the state ground is now supported by the Attorney General and Secretary of State of Texas since both are party-defendants in the suit with individual interests. These defendants never amended their answers in which they admitted expressly that the Secretary of State did not have the statutory authority which they now claim he has. Finally, the conclusion of the district court is not only unreasonable but unconstitutional. The Texas Election Code, Articles 1.03, 5.01, 5.02, 5.08, 5.09a, 5.10a, 5.17a and 5.18a expressly give Mr. Symm the duty and authority to (1) review the residential qualifications of voter applicants, (2) use forms other than those prescribed by the Secretary of State, and (3) reject applicants if

they do not satisfy residency requirements. The Secretary of State of Texas does not have the authority to abrogate the foregoing legislative enactments. Any attempt to confer such authority upon the Secretary of State, as was done by the district court, would amount to an unconstitutional delegation of legislative power. *See Bullock v. Calvert*, 480 S.W.2d 367 (Tex. Sup. 1972). Thus, the judgment is not supported by an adequate and independent state ground; but even if it were, such support would not justify affirming an erroneous interpretation of the 26th Amendment.

The United States also makes little attempt to refute or distinguish the contrary decisions in *Wilson v. Symm* and *Ballas v. Symm*. The same defendant, the same college students, and the same voter registration practices were involved in all three cases. There is no proof that the questionnaire used by Mr. Symm is used as a device to prevent legal residents from voting, unless we assume that students who do not intend to remain in Waller County after they finish college are residents. This case is therefore indistinguishable from *Ballas* and the resulting judgments should be the same.

For the reasons stated, the United States' Motion To Affirm should be denied.

Respectfully submitted,

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